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COMMONWEALTH OF MASSACHUSETTS, *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF ASPEN SKIING COMPANY AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Aspen Skiing Company ("ASC") is the owner and operator of four major destination ski and winter recreation complexes located in the central Rocky Mountain region of Colorado, spanning over 5,200 acres of skiable terrain on four mountains – Aspen Mountain, Snowmass, Aspen Highlands, and Buttermilk Mountain. In conjunction with its mountain operations, ASC also owns and operates two hotels and fifteen restaurants. ASC is a major contributor to the economy of Pitkin County and surrounding areas of central Colorado, generating over a million skier visits annually from around the world and employing approximately 800 persons year-round and over 3,400 employees during the winter season.

ASC is part of the larger Colorado ski and winter recreation economy, which generates well over $2 billion in revenues annually from mountain operations and associated businesses in surrounding communities. With well in excess of ten million skier visits annually (almost 60% coming from out-of-state and international locations), the Colorado ski resorts collectively employ nearly 31,000 people – approximately 14% of the total tourism-related jobs in Colorado and 8% of all employment in the state.[2]

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1. Pursuant to Supreme Court Rule 37.6, *Amicus* states that its designated counsel authored this brief in whole, and that no person or entity other than this *Amicus Curiae* made a monetary contribution to the preparation or submission of this brief. The parties' consent, other than the Solicitor General, to the filing of this *amicus curiae* brief has been lodged with the Clerk of the Court. The consent of the Solicitor General is being lodged herewith.

2. The data in this paragraph was provided by Colorado Ski Country USA, Economic Impact Study, March 2004.

As an industry highly dependent upon a high alpine ecosystem – ASC's mountain elevations ranging from a low of 7,870 feet above sea level at the base of Buttermilk Mountain to a high of 12,510 feet at the summit of Snowmass – and an ample seasonal snowpack, ASC's operations, and the Colorado winter recreation economy in general, are obviously extremely vulnerable to the adverse impacts of climate change. As explained below, ASC is already experiencing these impacts, and the prognosis under "business-as-usual" scenarios that fail to address air pollutants associated with climate change is bleak. For this reason, ASC supports the position of the Petitioners in this case.

SUMMARY OF THE ARGUMENT

The Administrator of the Environmental Protection Agency has the authority to regulate carbon dioxide and other air pollutants associated with climate change under section 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521(a)(1). The air pollutants in question "may reasonably be anticipated to endanger public health or welfare" through their climatological impact upon the viability of an entire recreational industry and associated economies.

ARGUMENT

Section 202(a)(1) of the Clean Air Act (the "Act"), 42 U.S.C. § 7521(a)(1), directs the Administrator of the Environmental Protection Agency to prescribe by regulation "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."

Congress has specified that "all language referring to effects on welfare" in the Act "includes, but is not limited to, effects on . . . weather, . . . climate, . . . as well as effects on economic values. . . ." 42 U.S.C. § 7602(h) (section 302(h) of the Act).

To the degree that air pollutants may cause or contribute to a climate change resulting in temperature increases in alpine environments, in Colorado and elsewhere, it is indisputable that the ski and winter mountain recreation industry will be impacted. With this impact will come derivative impacts upon the economies of associated communities and regions of the country.

A recent report from Colorado College[3] presents a downscaled climate model run on a regional scale for the eight-state Rocky Mountain region[4] derived from two different global general circulation climate models predicting the impact of climate change pollutants – the Parallel Climate Model (PCM) and Hadley Centre Climate Model (HadCM3). The former (more conservative) model predicts annual temperature increases across the region of 3 degrees Celsius to 5 degrees Celsius between 1976 and 2085, while the latter (mid-range) model predicts annual temperature increases over the same period of 5 degrees Celsius to 7 degrees Celsius.[5]

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3. The Colorado College State of the Rockies Project, *The 2006 Colorado College State of the Rockies Report Card*, Hecox, W., Hurlbutt, B., O'Brady, C., ed., April 2006, pp. 89-102, available at *http://www.coloradocollege.edu/stateoftherockies/06ReportCard.html* (last visited Aug. 23, 2006) (hereinafter "CC").

4. Idaho, Montana, Wyoming, Colorado, New Mexico, Arizona, Utah, and Nevada.

5. CC, n. 3, *supra*, at 92.

Running the mid-range HadCM3 model for two different emission scenarios – denominated "business-as-usual" and "reduced-emissions" – included in a 2001 report by the Intergovernmental Panel on Climate Change (IPCC),[6] the Colorado College report predicts temperature increases across most of the Rocky Mountains of 5 to 7 degrees Celsius under the "business-as-usual" scenario compared with 3 to 4 degrees Celsius under the "reduced-emissions" scenario.[7] The increase in winter temperatures under these scenarios is predicted to be 3 to 6 degrees and 1 to 5 degrees Celsius respectively.[8]

While the differentials recited above may not seem great at first blush, the Colorado College report predicts that the increase in winter temperatures "may cause several melting periods during the winter, and will have a great impact on the snowpack of the Rocky Mountain region."[9] This will cause the snowline to recede to higher elevations[10] and likely shorten the operational season for winter recreation resorts.[11] ASC's Chief Executive Officer states in the Colorado College report that a compression of a few dozen days in the ski season under current conditions would render the resort

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6. IPCC, "Climate Change 2001: Impacts, Adaptation, and Vulnerability" (2001), available at *http://www.grida.no/climate/ipcc_tar/wg2/index.html* (last visited Aug. 23, 2006).

7. CC, n.3, *supra*, at 93.

8. *Id.*

9. *Id.* at 94.

10. *Id.*

11. *Id.* at 99.

unprofitable, resulting in "an economic disaster."[12] The Colorado College report concludes that winter recreation resorts like Aspen could potentially become "unviable" by the year 2050.[13]

The predictions presented in the Colorado College report are echoed by the U.S. Global Change Research Program: "Snowpack is very likely to decrease as the climate warms, despite increasing precipitation, for two reasons. It is very likely that more precipitation will fall as rain, and that snowpack will develop later and melt earlier."[14] While snowmaking may provide a hedge to some degree, it is both expensive and a potentially heavy drain upon available water resources.[15] Early and late season mountain operations "are especially sensitive to temperature,"[16] resulting in the "compression" of the operating season noted above. While operating and economic predictions vary, it is likely even under optimistic analyses that a week will be shorn off the

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12. *Id.*

13. *Id.*

14. National Assessment Synthesis Team, U.S. Global Change Research Program, U.S. Dept. of the Interior, *Climate Change Impacts on the United States: The Potential Consequences of Climate Variability and Change*, (2000); available at *http://www.usgcrp.gov/usgcrp/Library/nationalassessment/overviewwater.htm* (last visited Aug. 23, 2006).

15. Aspen Global Change Institute, *Climate Change and Aspen: An Assessment of Impacts and Potential Responses*, (2006), pp. 75-78; available at *http://www.agci.org/aspenStudy.html* (last visited Aug. 23, 2006).

16. *Id.* at 78.

season by 2030, and anywhere from four to over nine weeks by the year 2100 under current climate change projections.[17] The economic consequences even by 2030 could range from $16 million to $56 million in personal income.[18] The economic impact would likely be exacerbated by volatility, *i.e.*, step-like climate changes and clumps of bad years.[19] By 2100, the Aspen Global Change Institute concludes that "it seems doubtful that assured, high-quality, destination skiing can be maintained as Aspen's winter *raison d'etre*," with even summer resort prospects less than clear.[20] And Aspen (and ASC) are deemed to be in a much stronger position economically and geographically to withstand and adapt to the impact of climate change than most other winter recreation areas in the country.[21]

While one may debate, to some degree, the severity of the prognosis for the winter recreation industry and its associated and dependent communities, the effects of climate change are already being experienced at Aspen and elsewhere. Over the past twenty-five years, Aspen has watched its total precipitation decrease by 6 percent, with snowfall decreasing by 16 percent (17 percent above 10,600 feet).[22] Average temperatures have already increased by about 3 degrees

17. *Id.* at 80.

18. *Id.*

19. *Id.* at 80-81.

20. *Id.* at 81.

21. *Id.* at 73-74.

22. *Id.* at xv.

Fahrenheit (1.5 degrees Celsius) over the same period and frost-free days have increased approximately 20 days per year.[23] The prognoses are in line with the historical trends. The impact of climate change is current, and well underway.

The present effects of climate change upon the alpine winter recreation industry – and businesses like ASC and the communities of which they are an integral part – are very real. The future, particularly under "business-as-usual" scenarios, appears anywhere from difficult to economically disastrous depending upon the predictive model employed. To the degree that air pollutants cause *or contribute to* climate change, it is respectfully submitted that it is well within the authority of the Administrator to regulate them.

CONCLUSION

For the foregoing reasons, ASC supports the position of the Petitioners and requests that the judgment of the United States Court of Appeals for the District of Columbia Circuit be reversed.

Respectfully submitted,

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23. *Id.*